

Decision **DRAFT DECISION OF ALJ THOMAS** (Mailed 10/21/2003)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SBC Pacific
Bell Telephone Company (U 1001 C) for
Authority Pursuant to Public Utilities Code
Section 851 to Lease Space to Pacific Telesis and
SBC Services Inc.

Application 03-06-031
(Filed June 23, 2003)

**DECISION ON SBC CALIFORNIA'S
APPLICATION TO LICENSE SPACE TO AFFILIATE**

I. Summary

In this decision, we allow SBC Pacific Bell Telephone Company (SBC) to enter into a revocable license with its affiliate SBC Services, Inc. (SBCSI) for use of vacant space SBC owns at 39 Beta Court in San Ramon, California. We find that SBC is not required to file an application pursuant to Public Utilities Code § 851 for permission to license the space, but rather may enter into the revocable license without Commission approval under the Commission's General Order (GO) 69-C.

II. Discussion

A. Use of Space

The 12,000 feet of space at issue has been vacant since mid-2001. SBC does not plan to use the space in the future, but if this situation changes, the license is fully revocable at SBC's discretion. The space will house SBCSI personnel who support the provision of E911 equipment. The license will permit

these SBCSI workers to be located near SBC utility employees who sell and distribute E911 equipment.¹

B. GO 69-C Criteria

GO 69-C provides a narrow exception to § 851's requirement for advance Commission approval of any sale, lease, assignment, mortgage or encumbrance of utility property. Under GO 69-C, utilities may, in certain circumstances, convey limited, revocable uses of utility property, such as easements, licenses, permits or other limited use of land, to third parties without prior Commission approval.

GO 69-C establishes three key criteria for permitting a utility to grant minor interests in utility property without Commission approval pursuant to § 851, as follows:

- The interest granted must be for a “limited use” of utility property;²
- The interest granted must not interfere with the utility's operations, practices and service to its customers;
- The interest granted must be revocable either upon the order of the Commission or upon the utility's own determination that revocation is desirable or necessary to serve its patrons or consumers.³

¹ In its original application dated June 23, 2003, SBC proposed to lease an additional 9,500 square feet of space to Pacific Telesis Group. In an amendment to the application filed on August 6, 2003, SBC informed the Commission that Pacific Telesis no longer sought to lease the space, and therefore withdrew that portion of its application.

² G.O. 69-C does not authorize utilities to grant permanent, irrevocable interests in utility property to third parties or to permit permanent, physical changes to utility property by or on behalf of third parties.

³ See D.02-10-057, finding of fact 3.

We believe that the proposed license agreement here meets each of these requirements, as discussed below.⁴

1. Limited Use

The proposed agreement affects a limited part of 39 Beta Court, which is an SBC-owned administrative building containing 66,000 square feet of space. It only affects space that is currently unused. No irreversible alteration of the space is planned.

2. Non-Interference with SBC Operations, Practices and Services

SBC has represented in the application that SBCSI's activities under the proposed license agreement will not impair or affect SBC's ability to provide utility service, and there has been no evidence to the contrary.

3. Revocability

The standard terms of the license are contained in a general agreement (Contract Number 3S1) between the SBC local exchange companies and SBCSI dated as of January 1, 2003, and provide that the license is revocable.⁵ Paragraph 15 of the general agreement regarding termination reads:

This agreement shall be effective January 1, 2003 and shall continue in effect until terminated by either party as provided below. Either party may terminate this Agreement in whole or in part upon giving at least

⁴ Since G.O. 69-C applies to this application, we need not address SBC's alternate request for approval pursuant to § 851.

⁵ Application, Exhibit G (*General Agreement Between SBC Local Exchange Companies: Nevada Bell Telephone Company, Pacific Bell Telephone Company, Southwestern Bell Telephone, L.P., the Southern New England Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Bell, Inc. (Seller) and SBC Services, Inc. (Buyer)*), ¶ 15 ("Term and Termination").

thirty (30) days advance written notice to the other party.

C. 851 Review vs. GO 69-C

ORA initially protested the application,⁶ and then withdrew its protest on the condition that SBC formally commit to a lease arrangement pursuant to § 851 rather than a GO 69-C license arrangement. ORA explained that, “public notice and scrutiny of leases of regulated assets by the Commission and other parties prior to approval is a critical element of the Commission’s public process.”⁷

We agree that there should be some scrutiny of these transactions, but at the same time are concerned that requiring a lease (rather than a revocable license) in every case where SBC wishes to let space to an affiliate⁸ would unduly constrain utility operations. A revocable license allows the utility the flexibility to ask the affiliate to leave the space if it becomes necessary, whereas a lease could constrain the utility for months or years (or cost it the price of a lease buy-out) if it needed to reclaim the space. Therefore, we find that a GO 69-C revocable license is preferable to a § 851 lease in this case.

⁶ *Protest of the Office of Ratepayer Advocates*, filed July 28, 2003.

⁷ See ORA *ex parte* letter to ALJ Thomas dated Aug. 27, 2003, as confirmed in *Brief of the Office of Ratepayer Advocates Regarding Regulatory Procedures for Utility Affiliates Leasing Office Space from Regulated Utilities* (ORA Brief), filed Sept. 4, 2003.

⁸ We do not agree with ORA that a license under GO 69-C can never include an agreement to let space. See ORA Brief at 3. If the agreement is revocable and meets the other GO 69-C requirements, a license can include agreements to allow an affiliate to occupy space owned by SBC.

III. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. ORA and SBC filed comments on November 10, 2003 and reply comments on November 17, 2003. SBC supports the decision to allow it to proceed under GO 69-C in this case, but opposes our generic statements about GO 69-C and § 851. ORA supports those statements. We believe the result the draft decision proposed would have simplified the process of obtaining GO 69-C licenses for SBC, while giving ORA a proper oversight role in reviewing such transactions. However, it appears SBC is dissatisfied with the proposed resolution, and would prefer to continue to file individual applications seeking Commission guidance on whether § 851 applies to each individual lease and license. While we view this solution as less efficient than the one we proposed in the draft decision, we will preserve the *status quo*. In this way, ORA will continue to have a role in reviewing individual applications, which SBC must continue to file under *status quo* arrangement.

We therefore omit our generic statements about GO 69-C and § 851 from the final decision.

IV. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The proposed license agreement is for a “limited use” consistent with GO 69-C.
2. The proposed license agreement will not interfere with SBC’s operations, practices or provision of services to its customers.

3. The proposed license agreement is revocable at will as required by GO 69-C.

Conclusions of Law

1. The proposed license agreement is authorized by GO 69-C and the requirement for prior Commission approval pursuant to § 851 does not apply.

2. Since the Commission need not further consider this application, the application should be dismissed.

O R D E R

IT IS ORDERED that:

1. SBC Pacific Bell Telephone Company (SBC) may grant a revocable license to its affiliate SBC Services, Inc. (SBCSI) for the use of 12,000 square feet of space at 39 Beta Court in San Ramon, California, pursuant to General Order (GO) 69-C without prior Commission approval.

2. This application is dismissed.

This order is effective today.

Dated _____, at San Francisco, California.